



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable W. L. Edwards
County Attorney
Victoria County
Victoria, Texas

Opinion No. O-4150

Dear Sir:

Re: Payment of county attorneys
who act as district attorneys.

Your letter of October 14, 1941, requesting the opinion of this department reads in part as follows:

"This letter is written in connection with your Opinion No. O-3773, addressed to the Hon. Geo. H. Sheppard. In that opinion, the department held that Mr. Martin could not draw his salary as District Attorney during his absence, and that there was no available appropriation for the payment of District Attorneys pro-tem. We are in accord with your opinion on those questions.

"I now ask you to consider this question from the standpoint of County Attorneys, who act in the absence of the District Attorney under Article 26 (CCP) as Amended, which reads as follows:

"Art. 26. The county attorneys shall attend the terms of all courts in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone, or when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court, and in such cases he shall receive all or one-half of the fees allowed by law to district attorneys, according as

Honorable W. L. Edwards, Page 2

he acted alone or jointly. In such cases he shall receive all or one-half of the fees allowed by law to the district attorney whose duties he performs, or assists in performing, but shall receive no part of the constitutional salary allowed to such district attorney, according as he acted alone or jointly; provided that fees collected by the county attorney from the State for such services shall be deducted by the Comptroller of Public Accounts from the fees which otherwise would have been paid to the district attorney had he represented the State alone; provided further this article shall not be construed as inhibiting any county attorney from voluntarily, with the consent of the district attorney, assisting the district attorney in the performance of his respective duties, without compensation. (As amended Acts 1933, 43rd. Leg., p. 177, ch. 83.)'

"The question thus presented as I see it is the construction of the word "fees" as to its synonymy with the words "salary" or "pay", in this particular instance.

"It is my contention that the word "fees" in this Statute should be construed with reference to the purpose of the Statute, which in this instance was undoubtedly to provide compensation for County Attorneys, who act in the absence of District Attorneys, at the same rate of pay as District Attorneys, and out of the fund set aside for the District Attorney. The Legislature undoubtedly contemplated that at times for some reason the District Attorney would be unable to act or would need assistance, and for that reason made provision for the compensation of the County Attorney. Any other construction leaves the Statute without meaning.

"It is my contention that the Statute, Art. 26 aforesaid, can be construed in no other way than that the word "fees" should be used interchangeably with the words "pay" or "salary", or any other words denoting compensation.

Honorable W. L. Edwards, Page 3

"It appears to me that the Legislature intended that the County Attorneys should be paid out of the salary fund of the District Attorney, and that the use of the word "fees", instead of the word "salary" was simply an oversight. To substantiate this statement, I call your attention to the history of the various articles involved. Article 26 was evidently written at a time when District Attorneys were on a fee basis. The original statute was the section which is above underlined. The 40th Legislature in 1927 amended Article 1021 C.C.P., which provides for the payment of District Attorneys. Of course, Article 1021, had the effect of taking the District Attorney off the fee basis and placing him on a per diem basis. The 43rd Legislature in 1933, after the passage of Article 1021, and its amendment, amended Article 26. The amended part being that portion which is not underlined above. I believe it to be the legal presumption that the Legislature took cognizance of the existing laws at the time it made this amendment. If this is correct, the Legislature then passed their amendment knowing that District Attorneys were no longer on a fee basis, but were on a per diem basis. Therefore, the intent of the Legislature was evidently to reach any funds held by the Comptroller to pay District Attorneys for the purpose of paying County Attorneys who act in their stead. Of course, Article 3886f (R.C.S.) is now the existing statute with reference to payment of District Attorneys. The above is cited for the purpose of showing that the Legislature did not intend that the word "fees" should be used in a restricted sense. As above stated, any other construction leaves Article 26, as amended, wholly valueless and meaningless.

"I do not believe the *Vogas* case, 67 S.W. (2d) 856, covers the situation. In the first place, that proceeding was evidently brought to recover fees as provided by Article 1025 C. C. P. In the second place the Court in disposing of the case cites Article 26 as it existed before its amendment. The court held that the County Attorney could not recover fees provided by Article 1025 for the reason that the District Attorney was not on a fee basis but was paid under Article 1021 on a per diem basis.

Honorable W. L. Edwards, Page 4

"By the amendment to Article 26, passed after the per diem law, I believe the Legislature clearly indicated its intention that the County Attorney should be paid out of the fund or money set aside for the purpose of paying the District Attorney had he acted.

"Manifestly, if this intention is clearly indicated, a strained or technical construction of a mere word should not be allowed to defeat it, especially when such construction would be inequitable.

"I further call your attention to the language of Section 2, of Art. 3886f R. C. S., the present salary law. This statute specifically reappropriates all monies heretofore appropriated by the Legislature to pay fees, salaries, and per diem accounts of the officers named.

"In view of the fact that the County Attorneys of Victoria, Calhoun, Refugio and Jackson Counties are affected, I ask that you give this matter your most careful consideration."

Article 31, Code of Criminal Procedure, provides:

"Whenever any district or county attorney fails to attend any term of the district, county or justices courts, the judge of said courts or such justice may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as is allowed the district attorney or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney."

As we understand your request you desire the opinion of this department with reference to the amount of compensation, if any, a county attorney is entitled when the county attorney acts in the absence of the district attorney under Article 26, Code of Criminal Procedure.

We think that Article 26 and Article 31, supra, must be

construed together, and when so construed, it is clear that the Legislature has made it the duty, and it is likewise the right, of the county attorney to represent the State in the district courts in the absence of the district attorney. In the absence of the district attorney, the duty and the authority to represent the State in the district court is conferred by the statutes upon the county attorney. It is not contemplated nor is it necessary, that the court should designate the county attorney as district attorney pro tem. It is only when the district attorney and the county attorney are absent that the court is authorized to appoint a district attorney pro tem. In a letter opinion addressed to Honorable Cullen D. Vance, County Attorney, Edna, Texas, on February 12, 1935, this department ruled that a district judge is without authority to appoint an attorney pro tem to represent the State when either the district attorney or the county attorney is present.

When the county attorney acts in the absence of the district attorney he must receive his compensation for said services under the provisions of Article 26, rather than under the provisions of Article 31. The right of the county attorney in such instance to compensation under Article 26 depends upon whether fees are allowed to the district attorney of the district for the services performed, in the absence of the district attorney, by the county attorney. Since January 1, 1936, the district attorneys in all judicial districts of this State have been compensated by the payment of an annual salary in 12 equal monthly installments, rather than by the allowance of fees. (Article 3886f, Vernon's Annotated Civil Statutes) "This compensation does not depend on the number of cases tried, or the result achieved, and excludes all other compensation except his annual salary." (Voges v. Sheppard, Comm. App. of Tex. Section A, opinion adopted by the Supreme Court, 67 S.W. (2d) 856.) Since district attorneys are no longer compensated on the fee basis, but by the payment of an annual salary, and the Legislature has made no provision for compensating the county attorney who acts in the absence of the district attorney by appropriation to him a part of the salary to be paid to the district attorney, it follows that the county attorney who acts in the absence of the district attorney is not entitled to compensation for the services thus rendered.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Ardell Williams

Ardell Williams
Assistant

AW:nw

APPROVED OCT 31, 1941
Cullen D. Vance
COUNTY ATTORNEY

APPROVE
OPINION
COMMITTEE

BY *CWT*
CHAIRMAN